(2)

No. 91-1760

FILED
JUN 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD CLARK JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether it violated the Due Process Clause of the Fifth Amendment for the district court to determine the lawfulness of electronic surveillance under the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.*, through an in camera, ex parte review of submissions by the government.

2. Whether the electronic surveillance of petitioner for the purpose of obtaining foreign intelligence information violated his rights under the Fourth Amendment.

3. Whether 18 U.S.C. 957, which prohibits the possession, in aid of a foreign government, of papers or property used or intended for use in violating any penal statute or international obligation of the United States, violates the First Amendment on overbreadth grounds.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	15, 16
Camera v. *Municipal Court*, 387 U.S. 523 (1967)	13
Duignan v. *United States*, 274 U.S. 195 (1927)	8
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568 (1988)	16
Forsyth County v. *The Nationalist Movement*, No. 91-538 (June 19, 1992)	15
Giordano v. *United States*, 394 U.S. 310 (1969)	8
Griffin v. *Wisconsin*, 483 U.S. 868 (1987)	12
Kevork, In re, 634 F. Supp. 1002 (C.D. Cal. 1985)	14
NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979)	16
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985)	12-13
New York v. *Burger*, 482 U.S. 691 (1987)	12
New York State Club Ass'n v. *City of New York*, 487 U. S. 1 (1988)	15, 16
O'Connor v. *Ortega*, 480 U.S. 709 (1987)	12
Parker v. *Levy*, 417 U.S. 733 (1974)	17
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987)	10
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1988)	12
Snepp v. *United States*, 444 U.S. 507 (1980)	13
Taglianetti v. *United States*, 394 U.S. 316 (1969)	8
United States v. *Belfield*, 692 F.2d 141 (D.C. Cir. 1982)	8

Cases—Continued: Page

United States v. *Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974) 11
United States v. *Buck*, 548 F.2d 871 (9th Cir.), cert. denied, 434 U.S. 890 (1977) 11
United States v. *Butenko*, 494 F.2d 593 (3d. Cir.), cert. denied, 419 U.S. 881 (1974) 11
United States v. *Cavanagh*, 807 F.2d 787 (9th Cir. 1987). 13
United States v. *Duggan*, 743 F.2d 59 (2d Cir. 1984) 6, 13
United States v. *Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982) 8, 14
United States v. *Isa*, 923 F.2d 1300 (8th Cir. 1991) 8
United States v. *Lovasco*, 431 U.S. 783 (1977) 8
United States v. *Megahey*, 553 F. Supp. 1180 (E.D.N.Y. 1982), aff'd, 729 F.2d 1444 (2d Cir. 1983) 8
United States v. *Ott*, 827 F.2d 473 (9th Cir. 1987) 8
United States v. *Pelton*, 835 F.2d 1067 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988) 13
United States v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991) 10
United States v. *Sarkissian*, 841 F.2d 959 (9th Cir. 1988) 14
United States v. *Spanjol*, 720 F. Supp. 55 (E.D. Pa. 1989) 8, 14
United States v. *Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982) 11
United States v. *United States District Court*, 407 U.S. 297 (1972) 12
Youakim v. *Miller*, 425 U.S. 231 (1976) 8
Zweibon v. *Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976) 11

Constitution and statutes: Page

U.S. Const.:
Amend. I 6, 15, 17
Amend. IV 4, 5-6, 10, 12
Amend. V (Due Process Clause) 7, 10, 17
Arms Export Control Act, 22 U.S.C. 2751 *et seq.*:
22 U.S.C. 2778(b)(1) 2
22 U.S.C. 2778(b)(2) 2
22 U.S.C. 2778(c) 2
Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.* 3
50 U.S.C. 1801(a)(4) 5
50 U.S.C. 1801(e)(1)(B) 5
50 U.S.C. 1801(e)(2)(B) 5
50 U.S.C. 1803 9
50 U.S.C. 1803(b) 9
50 U.S.C. 1803(c) 9
50 U.S.C. 1804 3
50 U.S.C. 1804(a)(7) 11
50 U.S.C. 1804(a)(7)(B) 4, 11
50 U.S.C. 1804(a)(7)(D) 5
50 U.S.C. 1804(a)(7)(E) 5
50 U.S.C. 1804(a)(9) 15
50 U.S.C. 1805 ..... 3, 9
50 U.S.C. 1805(a)(3) 12
50 U.S.C. 1805(a)(5) 11
50 U.S.C. 1805(d)(2) 6, 15
50 U.S.C. 1806(b) 4
50 U.S.C. 1806(c) 3, 4
50 U.S.C. 1806(f) 4, 9
18 U.S.C. 371 2
18 U.S.C. 956 2
18 U.S.C. 957 ..... 2, 6, 7, 15, 16, 17

Miscellaneous:

S. Rep. No. 604, 95th Cong., 1st Sess. (1977) 8
S. Rep. No. 701, 95th Cong., 2d Sess. Pt. 1 (1978) 6

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1760

RICHARD CLARK JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-97a) is reported at 952 F.2d 565.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1991. The petition for rehearing was denied on January 29, 1992. Pet. App. 100a-101a. The petition for a writ of certiorari was filed on April 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner

was convicted of conspiring to violate the Arms Export Control Act, 22 U.S.C. 2778(b)(2) and (c), by exporting devices for the discharge of bombs without an export license, in violation of 18 U.S.C. 371; manufacturing and exporting such devices, in violation of 22 U.S.C. 2778(b)(1) and (c); conspiring to injure the property of a foreign government, in violation of 18 U.S.C. 956; and possessing property used for violating United States law in aid of a foreign government, in violation of 18 U.S.C. 957. Pet. App. 11a-13a. He was sentenced to 120 months' imprisonment, to be followed by 36 months of supervised release. *Id.* at 78a n.23; Gov't C.A. Br. 11-12. The court of appeals affirmed. Pet. App. 1a-97a.

1. From 1978 until his arrest in July 1989, petitioner, an American citizen, engaged in research and development of explosives for export to the Republic of Ireland and use by the Provisional Irish Republican Army (PIRA) in its attacks against British civilian and military targets in Ireland and elsewhere. Between 1981 and 1986, petitioner sent a series of letters regarding the procurement and development of remote-control bombs to Peter Eamon Maguire, an electronic systems expert in the Republic of Ireland who was associated with the PIRA. The letters described petitioner's efforts to perfect the technology of the remote-control bombs used by the PIRA in its attacks on persons and property. In the letters, petitioner referred to the acquisition of 27 and 72 megahertz radio transmitters, the type typically used by the PIRA in its remote-control bombs. The letters also described petitioner's attempts to enhance the detonator system for the bombs by using the Weather Alert radio frequency. Since August 1983, Northern Irish authorities have recovered

fragments of Weather-Alert bombs in the wake of PIRA-sponsored bombings. Pet. App. 5a-7a & n.2.

In 1983, petitioner employed co-defendant Christina Leigh Reid as a courier of electronic components and information to "Sean," an associate of Maguire, in the Republic of Ireland. In 1988, Reid introduced petitioner to co-defendant Martin Peter Quigley, a citizen of the Republic of Ireland and a United States resident, who, like petitioner, was attempting to improve the PIRA's weapons technology. During a telephone conversation, Quigley requested petitioner's assistance in the development of a surface-to-air missile system to "counteract" British military helicopters in Northern Ireland. Pet. App. 7a-10a. Beginning in 1986, petitioner carried out his weapons research and development in a workshop that he built in the basement of his parents' home in Harwich, Massachusetts. *Id.* at 5a-6a.

Between August 1988 and July 1989, when petitioner was arrested, the government conducted electronic surveillance of petitioner and Quigley pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.* FISA establishes a procedure for a federal officer, acting through the Attorney General, to obtain a judicial warrant that authorizes the use of electronic surveillance in the United States for the purpose of obtaining foreign intelligence. 50 U.S.C. 1804, 1805. As a result of the electronic surveillance under FISA, the government recorded incriminating conversations between petitioner and his co-defendants. Pet. App. 13a-15a.

2. Prior to trial, the government notified petitioner and his co-defendants of its intention to introduce information derived from the FISA electronic surveillance. See 50 U.S.C. 1806(c). The government also provided the defense with copies of the logs, tran-

scripts, and tapes relating to the surveillance. Petitioner moved to suppress that evidence, contending that it was obtained in violation of the FISA statute and the Fourth Amendment, and he sought discovery of the FISA applications and orders. The Attorney General filed an affidavit stating that disclosure of those materials would jeopardize national security interests. The magistrate determined that disclosure of those documents was not necessary to make an accurate determination of whether the surveillance was lawful, and he therefore conducted an ex parte, in camera review of the FISA materials, as is authorized by 50 U.S.C. 1806(f). On the basis of that review, the magistrate concluded that the surveillance was lawfully authorized and conducted, and recommended that the suppression motion be denied.[1] The district court adopted that recommendation and admitted into evidence tapes of conversations derived from the FISA surveillance. Pet. App. 15a-16a.

3. The court of appeals affirmed petitioner's convictions. First, it rejected petitioner's contention that the electronic surveillance violated FISA in that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution.[2] The court noted that although the investigation of criminal activity cannot be the primary purpose of a FISA surveillance, evidence obtained under FISA may be used in criminal prosecutions. Pet. App. 18a; see 50 U.S.C. 1806(b) and (c). From its

---

[1] Report and Recommendation, *United States* v. *Johnson*, Crim. No. 89-221-MA (D. Mass. Apr. 13, 1990), *reprinted in* Gov't C.A. Br. Addendum.

[2] An application for electronic surveillance under FISA must contain a certification, among other things, "that the purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. 1804(a)(7)(B).

review of the government's FISA applications, the court concluded that the "primary purpose" for the surveillance of petitioner "was to obtain foreign intelligence information, not to collect evidence for any criminal prosecution." Pet. App. 19a.

Second, the court of appeals rejected petitioner's claim that the surveillance was illegal under FISA because petitioner's work for the PIRA was not directed against the United States and the information sought by the surveillance was not "necessary" to the prevention of international terrorism or the conduct of foreign affairs.[3] The court held that under FISA, the information sought need not be necessary to protect the United States against terrorism; it is sufficient if the information is necessary to the United States' ability to combat international terrorist activities. Pet. App. 22a. The court concluded that in light of petitioner's terrorist activities in support of the PIRA, the surveillance was justified under FISA to protect against international terrorism and to conduct the foreign affairs of the United States. *Id.* at 23a-24a.

The court of appeals also rejected petitioner's contention that the FISA provisions governing the surveillance of American citizens violate the Fourth

---

[3] For authorization to conduct electronic surveillance of a United States person, FISA requires that the information sought be "necessary to * * * the ability of the United States to protect against," *inter alia*, international terrorism by a foreign power (which includes a "group engaged in international terrorism or activities in preparation therefor," 50 U.S.C. 1801(a)(4)), or that it be "necessary to * * * the conduct of the foreign affairs of the United States." 50 U.S.C. 1801(e)(1)(B) and (2)(B), 1804(a)(7)(D) and (E).

Amendment.[4] The court agreed, Pet. App. 25a, with the reasoning of the Second Circuit in *United States* v. *Duggan*, 743 F.2d 59 (1984), that the "procedures established in [FISA] are reasonable in relation to legitimate foreign counterintelligence requirements and the protected rights of individuals." 743 F.2d at 73 (quoting S. Rep. No. 701, 95th Cong., 2d Sess. 14 (1978)).[5]

Finally, the court of appeals rejected petitioner's claim that 18 U.S.C. 957 violates the First Amendment.[6] The court noted that petitioner did not assert that his research and development of weaponry was constitutionally protected, but based his attack on Section 957 on overbreadth grounds. Pet. App. 46a.

---

[4] The court noted that that claim was not raised before the magistrate and was relegated to a footnote in petitioner's reply brief in the court of appeals. Pet. App. 24a; see Pet. C.A. Reply Br. 6 n.6. Although suggesting that the claim was therefore waived, the court nevertheless addressed it on the merits. Pet. App. 25a.

[5] Petitioner also contended that the government violated the requirements of FISA when it omitted the results of the first surveillance in its subsequent applications to extend the surveillance. Pet. App. 26a. The court of appeals held, Pet. App. 27a, that FISA permits the judge to extend a surveillance authorization on the same basis on which it issued the original order. See 50 U.S.C. 1805(d)(2). The court further found that the applications in this case "not only set forth the facts supporting prior applications, as required by [50 U.S.C.] 1804 (a)(9), but also meticulously supplied the FISA judge with new details of [petitioner's] terrorist activity." Pet. App. 27a.

[6] Section 957 states that "[w]hoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

The court concluded, however, that Section 957, although "broadly worded," does not reach a substantial amount of protected speech and therefore was not substantially overbroad. Pet. App. 49a, 58a-59a. The court explained that the purpose of the statute is not to regulate speech, but to punish the intended use of papers or property in crimes; it therefore construed the statute to apply only where "the papers or property * * * fall within an exceedingly narrow category of material, what might be called instrumentalities of crime." *Id.* at 54a. The court declined to review petitioner's claim that the statute is impermissibly vague in violation of the Due Process Clause, stating that since Section 957 clearly applies to petitioner, he lacks standing to assert that it might be vague as applied to others. Pet. App. 59a-61a.[7]

ARGUMENT

1. Petitioner contends (Pet. 7-10, 18) that the authorization for a district court to review the validity of electronic surveillance under FISA through in camera, ex parte proceedings violates the Due Process Clause of the Fifth Amendment. That claim does not merit this Court's review.

First, petitioner did not raise his due process claim in the court of appeals, and that court did not consider the Fifth Amendment issue presented here. "Ordinarily, this Court does not decide questions not

---

[7] The court of appeals also rejected petitioner's claims that the government's opening statement was prejudicial and that certain evidence was improperly admitted, Pet. App. 27a-36a; that Count 3 of the indictment failed to charge an offense and that the evidence supporting that count was insufficient, *id.* at 38a-44a; and that petitioner was sentenced incorrectly, *id.* at 73a-97a. Petitioner does not renew those contentions in this Court.

raised or resolved in the lower courts." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Petitioner suggests no reason for this Court to depart from its usual practice.

Second, petitioner's claim has been uniformly rejected by the lower courts.[8] Nothing in this Court's cases casts doubt on that result. See *Taglianetti* v. *United States*, 394 U.S. 316, 317 (1969) (per curiam) (upholding in camera examination of government materials in a challenge to electronic surveillance); *Giordano* v. *United States*, 394 U.S. 310, 314 (1969) (Stewart, J., concurring) ("We have nowhere indicated that this determination [whether a surveillance violated the Fourth Amendment] cannot appropriately be made in *ex parte*, *in camera* proceedings.").

Third, FISA does not violate due process. The purpose of FISA is to regulate "the use of electronic surveillance within the United States for foreign intelligence purposes." S. Rep. No. 604, 95th Cong., 1st Sess. Pt. 1, at 7 (1977). FISA creates a detailed set of "statutory safeguards" to protect against abuses in the use of electronic surveillance, *ibid.*, while implementing the "vitally important Government purpose" of gathering "necessary foreign intelligence information," *id.* at 9. In enacting FISA, Congress recognized the need for security and confidentiality sur-

---

[8] See *United States* v. *Isa*, 923 F.2d 1300, 1306-1307 (8th Cir. 1991); *United States* v. *Ott*, 827 F.2d 473, 476-477 (9th Cir. 1987); *United States* v. *Belfield*, 692 F.2d 141, 148-149 (D.C. Cir. 1982); *United States* v. *Spanjol*, 720 F. Supp. 55, 59 (E.D. Pa. 1989); *United States* v. *Megahey*, 553 F. Supp. 1180, 1193-1194 (E.D.N.Y. 1982), aff'd, 729 F.2d 1444 (1983) (Table); *United States* v. *Falvey*, 540 F. Supp. 1306, 1315-1316 (E.D.N.Y. 1982).

rounding the sources, techniques, and fruits of such intelligence.[9] FISA therefore provides that district courts must conduct an in camera and ex parte review to determine an aggrieved person's motion to suppress the fruits of FISA surveillance whenever, as here, "the Attorney General files an affidavit under oath that disclosure [of the FISA applications and orders] or an adversary hearing would harm the national security of the United States." 50 U.S.C. 1806(f). When such an affidavit is filed, "the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. 1806(f).

Contrary to petitioner's contention, Section 1806(f) is not unconstitutional. The government has a compelling interest in conducting electronic surveillance of foreign powers and their agents, and that interest would obviously be compromised, if not altogether frustrated, if the government were required to reveal the background information prompting such investi-

---

[9] FISA creates a special court, designated by the Chief Justice. The court consists of seven district court judges who determine whether to issue orders approving electronic surveillance, and a special appellate court of three judges who review FISA orders. 50 U.S.C. 1803. Orders approving FISA surveillance are entered ex parte. 50 U.S.C. 1805. If review of a denial of a FISA application is sought in this Court, the record is to "be transmitted under seal." 50 U.S.C. 1803(b). FISA also states that "[t]he record of proceedings under [FISA], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence." 50 U.S.C. 1803(c).

gations every time the target of that surveillance files a motion to suppress. The Due Process Clause contains no inflexible requirement of disclosure to the defendant of all materials considered by the court in adjudicating the legality of an investigation. See *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722, 728-729 (1991) (approving in camera procedures in trial court's review of a motion to quash a grand jury subpoena because of the "strong governmental interests in maintaining secrecy" of grand jury materials); cf. *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 58-60 (1987) (trial court may conduct in camera review of confidential records relating to child abuse to determine whether State complied with obligation to disclose exculpatory information).

In this case, the Attorney General filed an affidavit indicating that disclosure of the FISA authorization materials would jeopardize national security interests, and the magistrate concluded that no disclosure was required to make an accurate determination of the legality of the FISA surveillance. Petitioner's rights under FISA were amply protected by the determination of five judges—the FISA judge, the district judge, and the three court of appeals judges—that the FISA surveillance met the requirements of the statute. In light of that protection, and in light of the heightened concerns for confidentiality that are presented in the context of gathering foreign intelligence, the procedures for reviewing surveillance orders under FISA satisfy due process.

2. Petitioner also claims (Pet. 10-16) that the FISA surveillance violated his Fourth Amendment rights. He suggests FISA is unconstitutional because it does not require a warrant based on probable cause to believe that the target committed a crime. Alternatively, he claims that such a warrant is con-

stitutionally required at least when the government develops a criminal interest in a target who is a United States citizen. Neither contention has merit.

Prior to the enactment of FISA, several courts had held that the President has inherent power to conduct warrantless electronic surveillance to gather foreign intelligence information, and that such surveillance constitutes an exception to the warrant requirement.[10] By enacting FISA, Congress imposed statutory restrictions on that form of surveillance. FISA permits the issuance of an order authorizing electronic surveillance only when the government certifies, among other things, "that the purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. 1804(a)(7)(B). In order to permit FISA surveillance, the judge must find, *inter alia*, that a senior government official has made the requisite certification;[11] further, as to a United States citizen, the judge must find that the certification is not clearly erroneous. 50 U.S.C. 1805(a)(5). The judge must also find that "there is probable cause to believe" that the target of surveillance is a foreign

---

[10] See *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 912-914 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982); *United States* v. *Buck*, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). But see *Zweibon* v. *Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc) (dictum), cert. denied, 425 U.S. 944 (1976).

[11] The certification must be made by the Assistant to the President for National Security Affairs or an Executive Branch official that the President designates who is employed in the field of national security or defense and is subject to Presidential appointment and Senate confirmation. 50 U.S.C. 1804(a)(7).

power or an agent of a foreign power and that the place of surveillance is being used or will be used by a foreign power or an agent of a foreign power. 50 U.S.C. 1805(a)(3).

While FISA does not require probable cause to believe that the surveillance will turn up evidence of a crime, the Fourth Amendment does not mandate such a finding in this context. This Court has recognized that the showing required by the Fourth Amendment to justify surveillance for national security purposes is not necessarily the same as the showing required for a criminal investigation. In *United States* v. *United States District Court*, 407 U.S. 297, 322-323 (1972), the Court stated that "[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." That statement is consistent with this Court's recognition that "[w]hat is reasonable" for Fourth Amendment purposes "depends on all of the circumstances" and that "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'" *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (citation omitted). Applying that approach, this Court has upheld departures from the criminal warrant standard "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987).[12] FISA's requirements,

[12] See *Griffin*, *supra* (search of the home of a probationer); *New York* v. *Burger*, 482 U.S. 691, 699-703 (1987) (search of regulated business); *O'Connor* v. *Ortega*, 480 U.S. 709, 721-725 (1987) (search of employees' desks and offices); *New Jersey* v.

which are specifically tailored to the special needs of foreign intelligence surveillance, are similarly justified.

This country has a vital need for reliable foreign intelligence. As this Court said in *Snepp* v. *United States*, 444 U.S. 507, 512 n.7 (1980) (per curiam), "[i]t is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence." In light of that need, Congress has ample justification for authorizing foreign-intelligence surveillance without probable cause to believe that the surveillance will yield evidence of crime.[13] Moreover, the procedures governing the issuance of FISA orders—including certifications by senior government officials and detailed descriptions of the information sought, coupled with review by the specially constituted FISA court—adequately protect the privacy interests of targets. See *United States* v. *Duggan*, 743 F.2d 59, 73 (2d Cir. 1984); *United States* v. *Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); *United States* v. *Cavanagh*, 807 F.2d 787, 790-791 (9th Cir. 1987);

T.L.O., 469 U.S. 325, 337-342 (1985) (search of students' property at school).

[13] Given that the purpose of FISA surveillance is not to investigate criminal activity but to gather foreign intelligence, a requirement that the surveillance must be likely to turn up evidence of crime would be "illogical." *United States* v. *Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987). This Court has recognized that the probable cause requirement should be tailored to the specific "governmental interest at stake." *Camara* v. *Municipal Court*, 387 U.S. 523, 534-539 (1967) (holding that, in light of the purpose of an administrative search to enforce compliance with uniform safety standards, the probable cause for a search warrant may be shown on an area-wide basis).

Spanjol, 720 F. Supp. at 58; *In re Kevork*, 634 F. Supp. 1002, 1010-1014 (C.D. Cal. 1985), aff'd, 788 F.2d 566 (9th Cir. 1986); *Falvey*, 540 F. Supp. at 1311-1312.

There is no merit to petitioner's suggestion that the government may not rely on a FISA warrant to conduct surveillance once it develops a supplementary interest in enforcing the criminal law against a target. Pet. 16 & n.3. It is readily foreseeable that criminal concerns may develop in the course of investigating such matters as international terrorism. Yet as long as foreign intelligence needs are the predominant reason for the surveillance, the framework set forth in FISA remains justified. A more restrictive standard would unduly impede the gathering of foreign intelligence, since many of the activities that are investigated under FISA also constitute crimes. See *United States* v. *Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988).

To ensure that FISA surveillance is faithful to the statute's purpose, courts have required that the surveillance be conducted "primarily" to obtain foreign intelligence. *Pelton*, 835 F.2d at 1075; *Duggan*, 743 F.2d at 77. After reviewing the FISA applications in this case, both courts below concluded that, from the first surveillance authorization in July 1988 until July 1989 when petitioner was arrested, the primary purpose of the surveillance was to collect foreign intelligence and not to further any criminal investigation. See Pet. App. 19a. That factual finding, in which both courts below concurred, does not warrant this Court's review.[14]

---

[14] Petitioner also argues (Pet. 17-18) that the government failed, in violation of the FISA statute, to state the results of the initial surveillance in seeking extensions of the surveillance order. The court of appeals correctly rejected that claim. Pet. App. 26a-27a. The FISA statute expressly permits the FISA

3. Petitioner contends (Pet. 20-28) that his conviction for violating 18 U.S.C. 957 should be reversed on the ground that that statute violates the First Amendment. He does not argue that Section 957 violates his own First Amendment rights, since his possession of the Harwich laboratory, in which he carried out research and development of PIRA weaponry, does not implicate free speech concerns. Rather, he relies on the overbreadth doctrine, which allows a constitutional challenge to a statute whose terms are so broad as to chill a "substantial" amount of protected speech by other persons, even though the statute could legitimately be applied against the defendant. See *Forsyth County* v. *The Nationalist Movement*, No. 91-538 (June 19, 1992), slip op. 6-7; *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11, 14 (1988); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). The court of appeals' decision rejecting petitioner's overbreadth argument is correct and does not conflict with any decision of this Court or another court of appeals.

Because the overbreadth doctrine is " 'strong medicine' " that is used " 'sparingly and only as a last resort,' " a law may not be invalidated unless it is " 'substantially overbroad.' " *New York State Club Ass'n*, 487 U.S. at 14, quoting *Broadrick*, 413 U.S. at 613, 615. To succeed in his challenge, petitioner must show from the text of the statute and from actual fact "that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally."

---

judge to extend a surveillance "on the same basis as [the] original order." 50 U.S.C. 1805(d)(2). Although a FISA application must contain "a statement of the facts concerning all previous applications * * * and the action taken on each previous application," 50 U.S.C. 1804(a)(9), there is no requirement that the application describe the results of any prior surveillance.

New York State Club Ass'n, 487 U.S. at 14. Petitioner argues (Pet. 22) that "[t]he criminalization of the 'willful' possession of papers 'in aid of a foreign government' poses a serious threat to American citizens' basic right to speak out and participate in matters of international concern." The statute, however, does not penalize the mere possession of papers in aid of a foreign government; rather, the papers must be "used or designed or intended for use" in the commission of a crime or the violation of an international obligation of the United States.

As the court of appeals explained, Pet. App. 54a, it is not the "subversive message" of a paper at which the statute is directed, but its use as an "instrumentalit[y] of crime." On that construction, the statute would reach, for example, the possession of such papers as a counterfeit dollar or the blueprints for a bomb when the possessor intends to use these items in violating a penal statute or an international obligation of the United States in aid of a foreign government. On the other hand, the statute would not make illegal such conduct as the possession of a paper that merely advocates lawless activity in aid of a foreign government.

It is a familiar principle that the courts should construe federal statutes to avoid constitutional problems when such a construction is reasonable and consistent with the congressional intent. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 504 (1979). The court of appeals applied that principle here. Under the court's reading of Section 957, the statute is not "substantially overbroad" and, as in *New York State Club Ass'n*, 487 U.S. at 14, and *Broadrick*, 413 U.S. at 615-616, it must therefore be assumed that

"whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions * * * may not be applied."

Petitioner further implies (Pet. 23) that the statute infringes on First Amendment rights by predicating criminal liability on a person's knowledge of United States treaty obligations, international law, and even foreign law. That claim raises, at most, an issue of whether the statute provides sufficient notice of the conduct it criminalizes to satisfy the Due Process Clause. It is settled, however, that one whose conduct is clearly governed by a statute may not successfully challenge it for vagueness. *Parker* v. *Levy*, 417 U.S. 733, 756 (1974). Here, petitioner's liability under Section 957 did not depend on his knowledge of any treaty obligation of the United States, international law, or foreign law, but rested on his presumed knowledge of federal criminal law. Accordingly, petitioner lacks standing to object to the statute on vagueness grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JUNE 1992